UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PHILLIPS 66 COMPANY - BAYWAY REFINERY Employer, And INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 877 Petitioner.	§ § § § § § § § § § § § §	CASE NO. 22-RC-236762

THE EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION AND REQUEST TO STAY ELECTION PROCEEDINGS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELEVANT PROCEDURAL HISTORY 9

III. STATEMENT OF FACTS 11

IV. LEGAL ARGUMENT 14

A. Legal Standard For A Request For Review Of The Regional Director's Decision and Direction of Election 14

B. Supervisory Status Under The Act And The Burden To Prove Supervisory Status 15

C. The Regional Director's Conclusion That Console Supervisors Are Not Statutory Supervisors Is Clearly Erroneous And Departs From Longstanding Board Precedent 16

1. Console Supervisors are Intimately Involved in the Hiring Process and Effectively Recommend Decisions to Hire And Decisions Not to Hire 16

2. Console Supervisors Have Disciplined Employees and Have the Authority to Discipline Employees Even Though Discipline is Rare 23

3. Console Supervisors Adjust Grievances 29

4. Console Supervisors Reward Employees 32

5. Console Supervisors Schedule and Assign Work and Responsibly Direct Employees 37

6. Console Supervisors Possess Numerous Secondary Indicia of Supervisory Status and When Combined With Primary Indicia Are Statutory Supervisors Under the Act 43

D. The Board's Expedited Rules For The Handling Of Representation Petitions, The Conduct Of The Hearing and The Rejection of the Employer's Forty Year Exclusion Of Console Supervisors From The Bargaining Unit Has Resulted in Prejudicial Error Against The Employer and A Complete Lack of Due Process 46

E. The Board Should Stay Further Processing Of The Petition And Holding The Election Until It Grants The Employer's Request For Review And Determines That The Decision and Direction of Election Was Erroneous 49

V. CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases

Adco Electric,
307 NLRB 1113 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993) 22

Am. River Transp. Co.,
347 NLRB 925 (2006) 23

Angelica Healthcare Servs. Group,
315 NLRB 1320 (1995) 50

Austal USA, LLC,,
349 NLRB 561 (2007) 16, 17

Berger Transfer & Storage,
253 NLRB 5 (1980), *enfd.* 678 F.2d 679 (7th Cir. 1982) 21

Chevron U.S.A.,
309 NLRB 59 (1992) 23

Children's Farm Home,
324 NLRB 61 (1997) 37

*Cook Inlet Tug & Barge, In*c.,
Case No., 19-RC-106498, 2015 NLRB Lexis 506 (June 30, 2015) 22

Detroit College of Business,
296 NLRB 318 (1989) 20

Dynamic Science Inc.,
334 NLRB 391 (2001) 32

Entergy Systems & Service,
328 NLRB 902 (1999) 18

Fred Meyer Alaska, Inc.,
334 NLRB 646 (2001) 28

G4S Regulated Security Solutions,
362 NLRB No. 134 (2015) 16

HS Lordships,
274 NLRB 1167 (1985) 21

Kanawha Stone Company, Inc.,
334 NLRB 235 (2001) 36

Ken-Crest Services,
335 NLRB 777 (2001) 45

Loyalhana Care Ctr,
352 NLRB 863 (2008) 16

Lynwood Manor,
350 NLRB 489 (2007) 16

NLRB v. *Kentucky River Community Care*,
532 U.S. 706 (2001).....15

NLRB v. Yeshiva Univ.,
444 U.S. 672 (1980).....15

Oakwood Healthcare,
348 NLRB 686 (2006) 16, 32

Ohio Power Co. v. *NLRB*,
176 F.2d 385 (6th Cir. 1948), *cert. denied*, 338 U.S. 899 (1949).....15

Pacific Beach Corp.,
344 NLRB 1160 (2005) 16

Plumbers Local 195, ...16
237 NLRB 1099 (1978)

Phelps Community Medical Center,
295 NLRB 486 (1986) 45

Piscataway Assocs.,
220 NLRB 730 (1975) 50

Poly America
328 NLRB 667 (1999) 45

Queen Mary,
317 NLRB 1303 (1985) 15

Sears, Roebuck & Co.,
304 NLRB 193 (1991) 37

Shaw, Inc.,
350 NLRB 354 (2007) 41

Sheraton Universal Hotel,
350 NLRB 1114 (2007) 20

Station Casinos Inc.,
358 NLRB 637 (2012) 45

TEC Elec., Inc.,
Case Nos. 07-CA-37522, 07-CA-37980, 07-CA-38107, 2000 NLRB LEXIS
789 (November 7, 2000) 36

U.S. Gypsum Co.,
93 NLRB 91 (1951) 28

Veolia Transportation,
363 NLRB No. 188, slip op. (2016).....16

Wasatch Oil Refining Co.,
76 NLRB 417 (1948) 28

Waverly-Cedar Falls Health Care,
297 NLRB 390 (1989) 22

Westwood Health Care Center,
330 NLRB 935 (2000) 18

WSI Savannah River Site,
363 NLRB No. 113, slip op. (2016).....41

Youville Health Care Center,
326 NLRB 495 (1998) 16

Statutes

29 U.S.C § 152(11) 15

National Labor Relations Board Rules & Regulations § 102.67(d). 1,14

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THE EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION AND REQUEST TO STAY ELECTION

I. INTRODUCTION

Pursuant to Section 102.67 of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Phillips 66 Company – Bayway Refinery (hereinafter, "Employer" or "Phillips 66") respectfully submits this Request for Review of Regional Director David Leach's Decision and Direction of Election (hereinafter, the "DD&E") in the above-captioned case.[1] In addition, and the Employer believes this to be critically important, the Employer requests that the Board immediately stay election proceedings in this matter given the incredible ramifications associated with having a petitioned for bargaining unit of over forty (40) supervisors (in a group that has been supervisory for over forty (40) years) cast ballots in a representation election. Further, the Board's immediate attention is requested, given that the Region ordered an election (originally on July 1, now revised to July 2 and 3, as explained below) at breakneck speed after dedicating

[1] References herein to the Decision and Direction of Election will be abbreviated as "DD&E (page number)."

eighty-nine (89) days from the close of Hearing to refuting the Employer's overwhelming amount of evidence presented in support of supervisory status.

Sadly, the DD&E in this matter demonstrates two overarching points: 1) Region 22 has entirely re-written the rules relating to burden of proof and has not fairly judged the evidence in this matter, thereby imposing a nearly impossible standard on the Employer; and 2) the Board should view this matter as the test case demonstrating the complete and total impropriety of the so-called "ambush" election rules under the circumstances of this matter.

This case concerns a union, the International Brotherhood of Teamsters, Local 877 (hereinafter, the "Petitioner" or the "Union") with a seventy-two (72) year bargaining history at the Refinery, that has chosen to pursue the organization of the Refinery's Console Supervisors after decades of arguing that the Console Supervisors' managerial actions violated the parties collective bargaining agreement covering Refinery Operations and Mechanical[2] employees ("CBA"). We must restate that proposition to emphasize to the Board exactly what is happening here. For many years, the Union has argued the following: 1) scheduling and assignment decisions made by Console Supervisors violated the CBA resulting in many grievances of Console Supervisors' decisions; 2) in one instance, the Union arbitrated that Console Supervisors were management who improperly assumed certain unit work; and 3) the Union has grieved or filed unfair labor practice charges over disciplinary measures imposed by Console Supervisors. The Union has openly regarded these individuals as supervisors for decades and has understood that Operators are subordinate to Console Supervisors. Indeed, the Board must take note that Article 19-3 of the CBA (R-4) expressly requires the Union to "present the grievance in writing and confer with the appropriate supervisor." As demonstrated by the Employer's evidence, on many

[2] Union officers and officials are employed full-time at the Refinery holding Operations or Mechanical positions.

occasions the Union has chosen time and again bring their grievances against Console Supervisors, to involve Console Supervisors at Step 1, and to accept resolutions made by Console Supervisors.

Through this Petition, the Union hereby attempts to avoid future supervisory actions from these individuals by improperly fashioning the Console Supervisors into a collective bargaining unit made up entirely of supervisors. To be clear, this is not the case of an anti-union employer seeking to avoid employee organizing at all costs. This is an employer with a long history of largely unionized operations at its many facilities and refineries across the country.

Setting aside the Union's transparent motivation to disable the Console Supervisors' ability to be supervisors, the reality is that the Record reveals an abundance of evidence of multiple supervisory indicia, all of which was tossed to the side by a Region that ignored the preponderance of the evidence and chose instead to craft a fifty-five (55) page DD&E that took eighty-nine (89) days from the close of Hearing (and apparently multiple staffers from Region 22) to draft. The DD&E contains many glaring examples of the Region's unbalanced agenda in summarizing the record or positions of the parties.

By way of example, the DD&E asserts that a main thrust of the Employer's case was demonstrating that the correct title of the petitioned for unit is Console Supervisor. While it is true that this is the job title, the only reason that it received significant attention was because the Union, (including its president, John Pajak) obviously discredited themselves and their case by disingenuously claiming that the proper job title was "console operator".[3] Yet, the Region claims it is the Employer's issue and remarkably fails to even address the fact that the Petition was falsely certified, and that President Pajak engaged in full-throated, bald faced lying while on the witness

[3] Despite refusing to acknowledge the correct Console Supervisor title, Pajak admitted that Console Supervisors are "agent[s] of the Company."

stand to support this nonsensical sham. The Region also ignores that while the title is not dispositive, it is proof that the job in question is supervisory in nature and has been for decades. Instead of seizing upon the Union's tortured presentation, the Region chooses instead to overlook the fabrications of Union witnesses by failing to address this point in a candid manner.

By way of further example demonstrating the Region's inability to properly analyze or even summarize the facts, the Board must take note that despite the fact that the Region took eighty-nine (89) days and fifty-five (55) pages to analyze the job duties of the Console Supervisors, the DD&E summarizes their job functions as follows: "Console supervisors sit in front of the console board which consists of a series of large computer screens that could [sic] set to different schematics to show the overview of the operating unit. Their job is to monitor and adjust, if necessary, the pressure, temperature and flow of these of these units." This statement is nothing short of a gross understatement by the Region and a transparent attempt to minimize all of the evidence of supervisory indicia in one fell swoop. Candidly, if the above is the Region's overview of the position of Console Supervisor, it represents nearly a wholesale adoption of President Pajak's incredible testimony ("They operate a console") and it requires a finding that the Region has failed to even examine the Record, let alone comprehend it.

Sadly, a review of the pre-election hearing process, right up through (and even after) the issuance of the DD&E, reveals a blatant attempt to at first smother the Employer's presentation of its case, followed by an effort to prevent the Employer from effectively arguing its case, followed by a willingness to delay proceedings by three (3) months to craft a full-throated rebuke of the Employer's case, followed by the drafting of what amounts to the Union's reply brief

masquerading as the DD&E that contains egregious errors and which demonstrates a complete unfamiliarity with even the most basic of facts about the proposed unit.[4]

During the course of the Hearing, Region 22 made clear to the Employer that the Region desired the presentation of the case to be shortened and then tried to coerce the Employer into compliance. Notwithstanding the Region's efforts, the Employer submitted a mountain of testimonial and documentary evidence to prove its claim. The Regional Director, on day three (3) of the Hearing, ruled that no post-hearing briefs would be permitted, a further blow to the Employer's due process rights. The apparent justification for this was that the Region fully understood the law, so the parties could only file post-hearing factual arguments with no reference to the law, as long as such factual arguments were filed within three (3) days from the close of the Hearing, or one (1) day from receipt of the expedited, twelve-thousand dollar ($12,000) transcript.

After truncating and restricting the timing of the Hearing, the duration of the Hearing, the presentation of evidence and the right to argue legal points, the Region handed down the DD&E based almost entirely on two flawed presumptions: 1) whatever the Employer witnesses stated or whatever documentary evidence was presented by the Employer was conclusory or inconsequential; and 2) conclusory evidence does not establish supervisory status.

An examination of the DD&E reveals that the Regional Director completely ignored, without adequate explanation or reason, testimony of the Employer's six (6) witnesses, which supported a mountain of documentary evidence introduced at the Hearing. Instead, the Regional Director's consistent, inexplicable conclusion was that the record contains "insubstantial

[4] Indeed the Decision established the election date for a single day (July 1) until the Employer (after multiple attempts) convinced the Region that, although inappropriate and unwarranted, an election must be over two (2) days because the employees are shift workers covering twelve (12) hours shifts and two (2) days are needed in order to hold an election where most employees are permitted to vote while working. The original Decision would have permitted only seventeen (17) of over forty (40) unit members to vote during working time. That the Region could have failed to understand this point demonstrates that no one at the Region actually understood or comprehended the Record.

evidence" or that the "evidence fails to establish" that Console Supervisors are supervisors under the Act. This cuts directly against and ignores the over three-thousand (3,000) pages of documents that the Employer submitted into evidence.

It simply cannot be refuted that the overwhelming amount of convincing and detailed testimonial and documentary evidence presented by the Employer establishes that Console Supervisors have supervisory authority. This is what the "preponderance of the evidence" actually means. It means, the greater weight of the evidence required in a civil matter for the trier of fact to decide in favor of one side or the other. This preponderance is based on the more convincing evidence and its probable truth or accuracy, and not solely on the amount of evidence. Indeed, upon granting this Request for Review, we are confident that the Board will conclude that the only thing that is insubstantial or conclusory is the Region's rubber stamp rejection of the Employer's evidence and the Region's crediting of brief, but unbelievable, testimonial assertions made by Union witnesses. Not surprisingly, the Region continually found conclusory statements by the Union, that were unsupported by other evidence, as sufficient to rebut the Employer's testimony that was supported by documentary evidence. The Region's standard of proof in this matter, if accepted as law, would force Employer's to conduct a Hearing that lasts months and a delay in the proceedings that would also last months to gather the information necessary. Of course, such extremes are not required. The Employer's evidence in this matter was far more detailed, far more probative and far more reliable than was the Union's, and, as such, the Employer carried its burden of proving the supervisory status of the Console Supervisors.

Importantly, the preponderance of the evidence most certainly reveals the following about Console Supervisors:

1. *Hiring*: All testimony reflects that Console Supervisors participate in the hiring process, that they make decisions, and that their decisions and recommendations are followed.

Documentary evidence supports their participation and independent observations in this role. Union witnesses testified to facts that support finding that Console Supervisors hire or effectively recommend hiring.

2. *Discipline*: All credible witnesses with knowledge agreed that Console Supervisors have authority to discipline, some witnesses testified about incidents of actual discipline, and the Employer submitted actual documentary examples of discipline rendered by Console Supervisors, albeit while acknowledging that discipline has been rare. Union witnesses agreed that Console Supervisors have disciplined. Indeed, one Union witness, who is also a Console Supervisor, admitted that he has the "power to recommend discipline."

3. *Adjusting Grievances*: All credible witnesses with knowledge agree that Console Supervisors hear and adjust grievances. The Employer provided documentary evidence that over twenty (20) grievances from last year alone were heard at the first step by Console Supervisors and provided several examples where the Console Supervisors adjusted or resolved the grievance. Union witnesses verified that Console Supervisors have adjusted and do hear grievances.

4. *Assign and Direct*: All credible witnesses testified to the complexity of the scheduling issues that are fully owned by the Console Supervisors. The Employer provided documentary evidence of over thirteen-thousand (13,000) such changes made in the prior year.

5. *Reward Employees*: All credible witnesses testified that the Console Supervisors regularly reward operators in the field with meals, gift cards and recognition awards. The Employer provided examples of approximately one-hundred-twenty (120) such occasions in the prior year to support this. Union witnesses agreed that this rewarding of employees occurs frequently.

6. *Other Indicia*: the same is true of items such as management trainings/meetings, differences in compensation, performance appraisals and the like. In addition, the Employer submitted a wealth of information on secondary indicia.

In response to efforts to present this mountain of evidence, the Employer was essentially badgered on a daily basis to speed up or end the Hearing, or was told by the Hearing Officer that the Hearing was taking too long. Thus, through the Region's intentional compression of the Hearing into the shortest period possible, the Region's decision to heighten the burden of proof became its own self-fulfilling prophecy. In other words, the Region said "hurry-up and finish, but you should have done more to prove your case." Meanwhile, for the Union, it was clear to any observer that the Union gave up midway through the case, after its witnesses conceded direct points

as to the supervisory status of the proposed unit. The Region ignores this pivotal evidence and these central admissions, attempting to wash it away by referencing all such instances as "being taken out of context." To coin a phrase ripped right from the DD&E, the Board must determine that the Region's overarching, conclusory findings regarding the Union's admissions at Hearing are unsupportable.

The Regional Director's seeming refusal to credit testimony of Employer witnesses (even when supported by documentary evidence), constant willingness to ignore relevant Employer testimony on a particular subject, and consistent reliance on excerpts of Union testimony (provided by witnesses who were at best indifferent and in reality extremely untruthful) displays the Regional's Director's willingness to ignore facts and rationality and instead impose a DD&E unsupported by the record evidence or the law. Even more, the Regional Director, appallingly, was unmoved by testimony from the **Union's** own witnesses which supported the Employer's claim Console Supervisors possess at least one (1) of the twelve (12) enumerated Section 2(11) criteria. Most certainly, the Region should not be able to ignore the statements of the Petitioner, when those statements acknowledge that the Employer's position is correct. Such statements are not conclusory or superficial, they are admissions against interest. The reality is that the Regional Director held the Employer to a standard well above the preponderance of evidence, as required under the law. Instead, the Regional Director seemingly imposed a standard that approaches proof beyond a reasonable doubt. The imposition of such a standard by the Regional Director exceeds his legal authority and results in significant prejudice against the Employer.

Compelling reasons exist for granting this Request for Review based on the following grounds: (1) substantial questions of law and policy were raised because of the Regional Director's departure from reported Board precedent; (2) the Regional Director's decision on substantial factual

issues was clearly erroneous on the record, and such error prejudicially affected the rights of the Employer; (3) that the ruling of the DD&E has resulted in prejudicial error against the Employer, and; (4) that there are compelling reasons for reconsideration of an important Board rule or policy.

For these reasons, discussed below, the Board should grant Employer's Request for Review.

II. RELEVANT PROCEDURAL HISTORY

The Union filed the Petition (hereinafter, "Petition") in Case No. 22-RC-236762 on February 28, 2019, seeking to represent all full-time and part-time "Console Operators" employed by the Employer. (Bd. Ex. 1).[5] Notably, as made clear by the Employer throughout the Hearing, the Employer does not employ any employee under the job classification "console operator." The Parties and the Region adjourned the Hearing until March 13, 2019. On March 12, 2019, the Parties filed position statements as required by the Board's rules. (R-1 and P-1). The Employer timely served R-1 on the Union prior to 12 noon, while the Union failed to timely serve P-1 on the Employer prior to 12 noon.

The Hearing was conducted before Hearing Officer Saulo Santiago (hereinafter, "Hearing Officer") at Region 22 of the NLRB on March 13, 14, 18, 19 & 20, 2019 to determine the supervisory status of the Employer's Console Supervisors under Section 2(11) of the National Labor Relations Act (hereinafter, the "Act").

The Employer called the following witnesses at Hearing: Melanie Russell, (Human Resources Manager), Joseph Manney (Human Resources Business Partner Bayway - Labor Relations), Fernando Fraga (Production Superintendent), Sal Cassano (Training Department and

[5] Citations to Board Exhibits will be "Bd. Ex. (exhibit number)." Citations to the Transcript of the hearing will be noted herein as "Tr." followed by the page number reference. Citations to Employer exhibits will be noted herein as "R-" followed by the exhibit number reference." Citations to Union exhibits will be noted as "P-" followed by the exhibit number reference.

former Console Supervisor), Michael Costello (Console Supervisor assigned to Production Supervisor on March 4, 2019), and Joe Cruz (Console Supervisor). The Union called the following witnesses at Hearing: John Pajak (the Union's President, who also works as an Assistant Operator at the Refinery), Jeff Sanford (the Union's Recording Secretary, who also works as an Operator at the Refinery), Jane Pirrocco (a Union steward and its grievance chair, who works as a safety auditor at the Refinery), Tom Alexo (Console Supervisor), Jimmy Valentine (Console Supervisor) and Joe Maccie, Jr. (an instrument technician in training who is a member of the Union's bargaining unit and who previously worked as a Console Supervisor as an "uprate").

The parties were granted the right to file "post-hearing factual arguments" within thee (3) days following the close of the Hearing, but were not permitted to file post-hearing briefs that in any way addressed legal arguments. On March 25, 2019, the Employer timely filed its post-hearing factual arguments and served them on the Union. On April 2, 2019, the Board's website (i.e. docket) was updated to show that the Union had filed a post-hearing factual argument. The Employer inquired of the Region and Union Counsel regarding the filing and the absence of any service of same made upon the Employer. No satisfactory answer was provided and the Employer filed a Motion to Strike the Union's Post-Hearing Factual Argument. This Motion to Strike was granted by the Region, although it is interesting that filing of the Union's Post-Hearing Brief continues to be included as a docket entry and there is not a docket entry for the Motion to Strike or the Region's decision granting the Motion.

On June 17, 2019, eighty-nine (89) days after the Hearing closed and one-hundred-nine (109) days after the Petition was filed, the Regional Director issued the DD&E. The Regional Director found the Console Supervisors were "employees" and not "supervisors" under the Act, and that the petitioned-for unit was appropriate.

The Regional Director directed an election in the petitioned-for unit to occur on July 1, 2019 from 3:30 pm to 6:00 pm in the Chemical Administration Building Cafeteria located at the Employer's 1400 Park Avenue, Linden, New Jersey facility. Demonstrating the Region's complete lack of grasp on the nature of work performed by the Console Supervisors, the Regional Director initially scheduled the election on a date (July 1, 2019) that would have resulted in over half of the petitioned-for unit being disenfranchised from voting due their work schedule.[6] After two requests from the Employer to correct this egregious error, on June 19, 2017, the Regional Director issued an Order rescheduling the election to be conducted over two-days, on July 2 and July 3 from 3:30 to 6:30 pm.

III. STATEMENT OF FACTS

As stipulated by the Parties, the Bayway Refinery has been in operation since the early 1900s. Since approximately 1945, the Union has represented employees working under the CBA (and its predecessor CBAs). (R-4). Generally, those employees work in either Process (also called production or operations) or Maintenance. The Process employees (Operators and Assistant Operators) generally run the equipment in the Refinery and the Maintenance employees generally fall into different craft positions that maintain the equipment. (Tr. 36-37).

The Console Supervisors have held that title for at least thirty-five (35) years, or as long as any witness could remember.[7] The overwhelming documentary and testimonial evidence

[6] The Case Handling Manual (hereinafter, "CHM") makes clear that while the Regional Director has discretion in the selection of the election date, that discretion is limited by certain factors. The Regional Director should take into consideration "operational considerations and the relevant preferences of the parties." *See* CHM Section 11302.1 Moreover, "[W]here there is a choice, the regional director should avoid scheduling the election on dates on which all or part of the facility will be closed, on which past experience indicates that the rate of absenteeism will be high, or on dates that many persons will be away from the facility on company business or on vacation. Days immediately preceding or following holidays should also be avoided if the rate of absenteeism is likely to be high." *Id.*

[7] The Regional Director completely ignored that Union President and witness John Pajak falsified his testimony in this regard, straining to say that he was unaware of the job title of the Console Supervisors, despite overwhelming evidence to the contrary and a demonstrated history that he has used the title Console Supervisor many times previously (including in prior sworn testimony in other legal matters).

presented by the Employer establishes that Console Supervisors have authority, in the interest of the Employer, to engage in at least one (1) of the twelve (12) enumerated personnel actions tests. Specifically, Console Supervisors have the authority to hire, discharge, assign, reward, discipline, responsibly direct, and adjust grievances. In addition, the record evidence establishes that Console Supervisors also engage in a multitude of different secondary indicia. Indeed, the Regional Director found that "console supervisors may have some secondary indicia of supervisory authority." (DD&E 50).

At Hearing, the Employer admitted over three-thousand (3,000) pages of documents into evidence that establish that Console Supervisors possess at least one (1) of the twelve (12) enumerated personnel actions tests. Below, we briefly review some of the documentary evidence.

R-15 was admitted into evidence by the Employer as proof Console Supervisors are involved in the hiring process and effectively recommend candidates for hire. R-15 was supported and corroborated by the testimony of Cassano and Console Supervisors Costello and Cruz. (Tr. 184, 188-189, 269-270, 382-383). Indeed, the Regional Director noted four (4) Console Supervisors participated in this year's hiring process and six (6) other Console Supervisors have participated in the hiring process in the past. (DD&E 9). The Union admitted Console Supervisors participate in the hiring process. (Tr. 700-701, 814, 1038).

R-5, R-32 and R-33 were admitted into evidence by the Employer as proof Console Supervisors issue discipline and can effectively recommend discipline. This was supported by the testimony of Manney, Fraga, Cassano and Console Supervisors Costello and Cruz. (Tr. 46, 48, 204, 274, 386). The documents reflect discipline administered by Console Supervisors. After the Union disputed that Console Supervisor Lambert was working as a Production Supervisor at the

time he disciplined Union president Pajak, the Employer provided additional documentary evidence demonstrating that Lambert was a Console Supervisor at that time. (R-32).

R-6, R-8, R-22, R-23, R-24, and R-28 were admitted into evidence by the Employer as proof Console Supervisors adjust grievances on behalf of the Employer. This was supported by the testimony of Manney, Fraga and Console Supervisor Cruz. (Tr. 51, 72, 381). Indeed, Union Witness Pirrocco settled a grievance with Console Supervisor Cruz. (Tr. 893-894). In addition, Pirrocco, Pajak and Console Supervisor Valentine confirmed their awareness and/or personal involvement with Console Supervisors whose decisions were grieved or who had heard grievances at the first step. (Tr. 689-690, 800, 896-897, 942, 1032).

R-5, R-19, R-20 and R-21 were admitted into evidence by the Employer as proof Console Supervisors reward employees. This was supported by the testimony of Cassano and Console Supervisors Costello and Cruz and was admitted by the Union. (Tr. 42, 43, 45, 200, 265, 266, 267, 383, 385, 386, 483, 665, 691, 887, 1036).

R-2 and R-3 were admitted into evidence by the Employer as proof of Console Supervisors constant involvement in scheduling and indicia of assignment. This was supported by the testimony of Fraga, Manney and Console Supervisors Costello and Cruz. (Tr. 35-37, 258-259-261, 262-265 374-375, 477).

R-14 and R-11 were admitted into evidence by the Employer as proof Console Supervisors responsibly direct employees. This was supported by the testimony of Cassano, Fraga and Console Supervisors Costello and Cruz. *(*Tr. 204, 626, 265, 389-390 494-495). This was also supported by the testimony of Union witnesses and Console Supervisors Alexo and Valentine. (Tr. 649, 689, 727, 518, 869).

R-5, R-9, R-16, R-17, R-27, R-29 and R-30 were admitted into evidence as proof Console Supervisors engaged in a multitude of secondary indicia. This includes: Console Supervisors are viewed as supervisor by employees; Console Supervisors attend management meetings and supervisor/manager training sessions that are not open to non-supervisors or employees under the Act; Console Supervisors have different terms and conditions of employment than Operators and AOs, including pay on a salary basis, enhanced bonuses under the VCIP program, eligibility for and award of Restricted Stock Units, different uniform/dress requirements; Console Supervisors regularly administer the CBA; the ratio of Console Supervisors to Operators and AOs is appropriate and the ratio of supervisors to "employees" under the Act would be absurdly low if the Console Supervisors were deemed employees under the Act, and; Console Supervisors work in a different work location than the Operators and AOs. The Regional Director concluded that Console Supervisors "may have some secondary indicia of supervisor authority." (DD&E 50).

IV. LEGAL ARGUMENT

A. Legal Standard For A Request For Review Of The Regional Director's Decision and Direction of Election

The Board may grant review of a Regional Director's unit determination in certain circumstances. Specifically, review may be granted where:

1. A substantial question of law or policy is raised because of: (i) the absence of; or (ii) departure from, officially reported Board precedent;
2. The Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party;
3. The conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error, or;

4. There are compelling reasons for reconsideration of an important Board rule or policy.

See NLRB Rules & Regulations § 102.67(d). The Employer's Request for Review in this case is premised on all four (4) grounds.

B. Supervisory Status Under The Act And The Burden To Prove Supervisory Status

Under the terms of Section 2(11) of the Act, a supervisor is any person having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. *See* 29 U.S.C § 152(11).

One may be a supervisor without meeting all the criteria of Section 2(11*). See Ohio Power Co*. v. *NLRB*, 176 F.2d 385, 387 (6th Cir. 1948), *cert. denied*, 338 U.S. 899 (1949). In fact, the Supreme Court has indicated that an employee may be classified as a supervisor if he or she meets any of the twelve (12) enumerated personnel actions tests. *See NLRB v. Yeshiva Univ*., 444 U.S. 672, 682 (1980); *see also Queen Mary*, 317 NLRB 1303, 1303 (1985).

Thus, individuals are statutory supervisors if: 1) they hold the authority to engage in any one of the twelve (12) listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer." *See NLRB* v. *Kentucky River Community Care*, 532 U.S. 706, 713 (2001).

In addition, while the exercise of one or more of the statutorily described functions in Section 2(11) is always the focal point for assessing supervisory status of an individual, the Board also considers "secondary indicia" in determining whether a particular individual is a "supervisor"

within the meaning the Act. *See Pacific Beach Corp*., 344 NLRB 1160, 1164 (2005). Even after *Oakwood Healthcare*, 348 NLRB 686 (2006), the Board has still relied on the presence of secondary indicia of supervisor status where such indicia can "corroborate" a determination that is based on the Section 2(11) test. *See Loyalhana Care Ctr*, 352 NLRB 863, 864 (2008).

The party asserting supervisory status bears the burden of establishing that status. *See Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006); *see also Youville Health Care Center*, 326 NLRB 495, 496 (1998). The party asserting supervisory status must prove it by a preponderance of the evidence, and this requires detailed, specific evidence. *See Veolia Transportation*, 363 NLRB No. 188, slip op. at 7 fn. 19 (2016); *see also G4S Regulated Security Solutions*, 362 NLRB No. 134, at *10 (2015). Conclusory statements without supporting evidence do not establish supervisory authority. *See Lynwood Manor*, 350 NLRB 489, 490 (2007); *see also Austal USA, L.L.C.*, 349 NLRB 561, 561 fn. 6 (2007). The Regional Director acknowledges that the above is the appropriate standard, however the DD&E makes clear that the Employer was held to a much higher standard and the Regional Director disregarded Board precedent.

C. The Regional Director's Conclusion That Console Supervisors Are Not Statutory Supervisors Is Clearly Erroneous And Departs From Longstanding Board Precedent

1. Console Supervisors are Intimately Involved in the Hiring Process and Effectively Recommend Decisions to Hire And Decisions Not to Hire

The Regional Director erred by failing to find that Console Supervisors effectively recommend candidates for hire. Ignoring a veritable mountain of evidence, the Regional Director found, without citing a single authority, that "there is *insufficient evidence* to establish that [console supervisors] recommendations of candidates to the final list were effective," because hiring managers meet with interviewers which leads to the creation of a list for the final decision maker. (DD&E 37-38). This reasoning amounts to an impermissible effort to hold the Employer to a

standard that far exceeds a preponderance of the evidence. The documentary evidence supported by testimony is clear and largely uncontroverted, although not enough for the Regional Director.

Having rejected the value of titles and job descriptions, the Regional Director then relies on his analysis that the authority to hire is not specifically listed as a job responsibility of a Console Supervisor and then treats this as dispositive in determining whether a supervisor possess the authority to hire. (DD&E 7, 36). Nonetheless, the Regional Director concedes, in the very next sentence, that "it is undisputed that console supervisors have participated in the hiring process of operations employees." (DD&E 7). The Regional Director also acknowledged that the only individuals from operations who conduct actual interviews of applicants are "production supervisor[s], console supervisor[s], area supervisor[s], etc." (*Id*.). In essence, the Regional Director admits that ONLY supervisors, including Console Supervisors, interview applicants.

There is no dispute that at interviews, the teams of interviewers work off a prepared set of questions and guidelines to seek information from applicants on eight (8) different dimensions: tech/prof knowledge & skills; decision making; contributing to team success; safety; motivational fit; initiating action; applied learning; and impact/communication. (DD&E 7-8). The interviewer then rates an applicant based on the eight (8) dimensions and provides his/her "overall rating, impressions and comments." (*Id*.). While the Regional Director acknowledges Cassano's testimony that interviewers undoubtedly use their discretion and independent judgement to score each applicant (DD&E 8; Tr. 189), he ignores supporting testimony from Console Supervisors Costello and Cruz that during the interview process they are effectively recommending someone for hire or not based on the score that they attribute to an applicant. (Tr. 269-270, 382-383). This testimony was also unrebutted by the Union. Persons with the power "effectively to recommend" the actions described in Section 2(11) are supervisors within the statutory definition. *See Entergy*

Systems & Service, 328 NLRB 902, 903 (1999); *see also Westwood Health Care Center*, 330 NLRB 935, 938–939 (2000).

The Regional Director then downplays the undisputed discretion and independent judgment used by Console Supervisors during the interview process by arguing that the scores each interviewer gives "often directly correlate to the applicants' original rankings established before the interview." (DD&E 37). But, as Cassano and Costello testified, without rebuttal, each supervisor, including Console Supervisors, ultimately decides what score to give. (Tr. 196, 272).

The argument advanced by the Regional Director, without any basis in the record evidence, that discretion and independent judgement are not used by Console Supervisor during interviews is also flatly contradicted by the testimony and documentary evidence adduced at Hearing. Indeed, R-15 contains over three hundred (300) pages of hiring-related forms from seven (7) different Console Supervisors (aside from Costello and Cruz, who both admitted to participating in the hiring process, and whose testimony was unrebutted by the Union) who conducted interviews from 2017 - 2019. Even a cursory review of those documents reveal that interviewers, including Console Supervisors, certainly use discretion and independent judgment when interviewing an applicant. When an interviewer provides that the applicant seems to "have a good work ethic," is a "smart worker," "would learn the job well," is "relatable," has "good safety instincts," has "sound decision-making" and "would be a good fit," that interviewer is not simply checking a box or assigning a score based on proscribed guidelines. Rather that interviewer, including the Console Supervisor, is an active participant in the interview process drawing conclusions on applicants based of their discretion and independent judgment. (R-5).

The Regional Director also chose to ignore R-11, which represents various performance agreements of Console Supervisors. These performance agreements show that some Console

Supervisors (and their superiors) highlight their active participation in the new hire process, including conducting tabletop interviews and individual interviews of applicants.

While the Regional Director argues that the "evidence is unclear as to how many console supervisors have participated in the hiring process every year" (DD&E 9), the indisputable evidence reveals that Console Supervisors do in fact participate in the hiring process. In fact, by the Regional Director's own admission, between 2017 and 2019, at least nine (9) different Console Supervisors have conducted interviews for prospective applicants. (DD&E 9). Therefore the preponderance of the evidence clearly provides that Console Supervisors play an integral role in the hiring process. The problem is, the Regional Director is looking for "conclusive evidence," which is not the applicable standard. (DD&E 9). What seems clear from the DD&E is that the Region was looking for any excuse not to credit the Employer's evidence.

On extremely short notice, the Employer produced and introduced into evidence more than sufficient information to satisfy the actual burden of proof required. This is not a criminal proceeding and the Employer's task was to prove its position by a preponderance of the evidence.[8] The Employer presented testimony from several current and former Console Supervisors about their key involvement in the hiring process. (Tr. 184, 269, 382, 383, 444, 477). Cassano, Costello and Cruz all testified that they have conducted interviews of applicants while serving as a Console Supervisor. (Tr. 184, 269-270, 382-383). This participation includes interviews in various different stages of the hiring process — from collaborative table top interviews to individual interview of applicants. (Tr. 188, 199, 269-270 and 382-383). Of course, the Regional Director erroneously

[8] The Employer argues that in this matter the burden of proof should actually fall on the Union. Consider that here the Union, the Employer, the Console Supervisors and all other employees at the Refinery have known and accepted the Console Supervisors as supervisors for many decades. The Union files a falsely stated Petition and suddenly this status is challenged. Rather than the Union having to prove that the Console Supervisors are employees, the burden is placed on the Employer to demonstrate that what it has been doing for the last thirty-five (35) to forty (40) years is correct. Under these circumstances it would be more appropriate for the Union to bear the burden of proof.

disregards such testimony because the evidence is unclear "as to how many" Console Supervisors have participated, or there is "insufficient evidence" or "no conclusive evidence." (Dec 9, 37). Petitioner witnesses Sanford and Console Supervisors Alexo and Valentine admitted that Console Supervisors play an active role in the interview process. (Tr. 701-701, 814, 1038). Indeed, Alexo admitted that he has previously taken part in the hiring process. (Tr. 700-701). The Regional Director erroneously ignores these admissions.

Instead, the Regional Director repeatedly downplays how intimately involved Console Supervisors are in the hiring process, arguing that the role the Console supervisors play is "much smaller" and that the "the record contains insubstantial evidence that console supervisors have the authority to recommend hiring . . ." (DD&E 35, 36). Such a position, given the testimony and documentary evidence adduced at Hearing is, quite frankly, mind-boggling and wholly unsupported by the record.

The Regional Director seems to base his position that Console Supervisors do not have the authority to recommend hiring on the following two points. First, that there is a multitude of supervisory personnel involved throughout the hiring process, specifically that the Console Supervisors are one of three interviewers conducting interviews of applicants. (DD&E 36.) This narrow position is a departure from established Board precedent. In fact, the Board has found that supervisory status is not undermined simply by the participation of other statutory supervisors in the hiring process. *See Detroit College of Business,* 296 NLRB 318, 319 (1989); *see also Sheraton Universal Hotel,* 350 NLRB 1114, 1118 (2007). As was made clear throughout the Hearing, the hiring process is a collective and collaborative approach with multiple supervisors involved in various stages throughout the process. (Tr. 188, 271).

Second, the Regional Director erroneously ignored all of the testimony and evidence adduced by the Employer regarding the weight Console Supervisor interview recommendations are given in the actual hiring of the applicant. (DD&E 36, 37). Indeed the Regional Director concludes that the testimony of Cassano means something completely different then what is captured in the record. As the Regional Director notes, Cassano testified that he would hope his opinion (when he was a Console Supervisor) held as much weight as the other interviewers, but stated "maybe some more experienced guys might have a little more, you know? I'm not sure." (DD&E 8). Amazingly, the Regional Director interprets this to be an admission by Cassano that certain recommendations by other supervisors are accorded more weight and concludes that this means that Console Supervisors do not recommend hiring. There is no support in the record for this erroneous conclusion. In fact, Cassano and Console Supervisor Costello testified each score provided by each supervisor is assigned the same evidentiary weight. *(*Tr. 189, 271).[9]

The Regional Director's finding that "there is no evidence to indicate who makes the final decision on the list: the hiring manager, the interviewers or a combination of both" (DD&E 37) is yet another example of how the Regional Director holds the Employer to a heightened burden of proof and his contention is also belied by the actual facts. Cassano testified that after the final round of interviews, the interviewers meet and the scores from all the supervisors are tabulated, with a final recommendation chart (draft list) created that ranks applicants from highest to lowest. (Tr. 197*;* R-15). The testimony is also clear that this "draft list" is provided to the Refinery

[9] Indeed Cruz testified that two applicants that he recommended not be hired, were ultimately not hired. (Tr. 383). The authority to effectively recommend against hiring a candidate can also establish supervisory authority. *See Berger Transfer & Storage*, 253 NLRB 5, 10 (1980), *enfd.* 678 F.2d 679 (7th Cir. 1982), *supplemented by* 281 NLRB 1157 (1986) (supervisory status found where a salesman's recommendation to hire a candidate was followed by interviews with company officials, but his recommendation against hiring a candidate was normally final); *see also HS Lordships*, 274 NLRB 1167, 1173 (1985) (supervisory status found where a bar manager's recommendations not to hire were followed). The Regional Director attempts to dismiss this by providing that "there is no conclusive evidence that they were eliminated as a result of Cruz's recommendations even though Cruz's credibility was not questioned or challenged by the Regional Director and even though the Petitioner did not refute Cruz's testimony.

Leadership Team (RLT) and the HR group and offers of employment are made. Importantly, Cassano and Russell further testified that once Human Resources has the recommendation chart, there are no additional interviews but instead the RLT selects from that draft list the applicants to whom offers are made. (Tr. 199, 215, 448-449). As Russell testified, this has been a rubber stamp of the choices made by Console Supervisors and others involved in the hiring process. (Tr. 448). A hiring recommendation is effective if the recommendation is relied on without further inquiries. *See Adco Electric*, 307 NLRB 1113, 1124 (1992), *enfd.* 6 F.3d 1110 (5th Cir. 1993); *see also Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989).

Similarly, the Regional Director's finding that "the Employer's witnesses also have no knowledge as to whether RLT actually reviews the interviewers notes and recommendations before making a final decision" holds the Employer to an impossible burden of proof, but is also nonsensical (DD&E 37). It is clear that the RLT does not conduct additional interviews. (Tr. 199, 215, 448-449). Given this, there can be no doubt that what the RLT relies upon to make the final decisions are the interviewers notes and recommendations.

The reality is that to establish supervisory status, an individual's influence on the hiring process must be based on actual delegated authority to participate in the hiring process and not merely on respect for the judgment of the person making the recommendation. See *Plumbers* Local 195, 237 NLRB 1099, 1102 (1978); *see also Cook Inlet Tug & Barge, In*c., Case No, 19-RC-106498, 2015 NLRB Lexis 506, at *88 (June 30, 2015). The standard that the Board has applied to determine whether recommendations for personnel actions are given enough weight to render them supervisory is that such recommendations are "insufficient to satisfy the statutory standard for supervisors *unless* . . . management is prepared to implement the recommendation without an independent investigation of the relevant circumstances." *See Chevron U.S.A.*, 309 NLRB 59, 65

(1992); *see also Am. River Transp. Co*., 347 NLRB. 925, 943 (2006)**.** Despite the Regional Director's efforts to downplay the fundamental role Console Supervisors play in the hiring process, the record evidence clearly reveals that it is substantial and that recommendations of Console Supervisors, in addition to the recommendation of other supervisors, are given appropriate weight without an independent investigation being conducted.

Finally, the Petitioner's contention that "one does not become a supervisor for being a participant in the hiring process" (DD&E 9) should mean nothing, but appears to have been given weight by the Regional Director.[10] The Employer is not contending that the mere participation of the Console Supervisor in the hiring process is evident of supervisory status. Rather, a preponderance of the record evidence reveals that Console Supervisors are intimately involved in the hiring process and effectively recommend applicants for hire.

2. Console Supervisors Have Disciplined Employees and Have the Authority to Discipline Employees Even Though Discipline is Rare

The Regional Director erred in concluding that "the record contains no reliable evidence that console supervisors exercised the authority to discipline or recommend [or effectively recommend] discipline." (DD&E 38, 40). The Regional Director completely ignored and seemingly discounted, without much explanation, testimony from five (5) Employer witnesses that testified that even though employee discipline is rare, Console Supervisors are fully authorized to discipline or effectively recommend discipline. It simply cannot be disputed that Manney, Fraga, Cassano, Costello and Cruz all testified to this point. (Tr. 46, 48, 204, 274, 386).

[10] The fact that Pajak provided hearsay testimony alleging that he rejected the opportunity to sit in on some interviews two or three years ago is less than meaningless. However, the Regional Director improperly gave it weight since he noted that it went unrebutted. (DD&E 9). It is truly incredulous that the Region would credit nonsense hearsay such as this over the probative and corroborated evidence submitted by the Employer.

Although the Regional Director concludes that the Petitioner's Console Supervisor witnesses refuted the Employer's Console Supervisor witnesses, this is overly simplistic and fails to provide the full picture. Indeed, on cross-examination, Alexo admitted that Console Supervisors have the authority to discipline and that he is aware that some Console Supervisors coach and provide verbal counseling to their direct reports. (Tr. 718). This was completely ignored by the Regional Director. In addition, Operator Sanford, without any hesitation, admitted that Console Supervisors have, from time to time, disciplined direct reports and that they have the authority to recommend discipline of direct reports. (Tr. 1035). In an attempt to downplay Sanford's admissions, the Regional Director, without any supporting evidence whatsoever, simply concludes that Sanford was (somehow) "pressed to conclude that console supervisors could obviously discipline employees." (DD&E 12). Apparently, asking a question on cross-examination related to the exercise of a supervisory criteria in a case, is impermissible pressing or coercing a union witness. To the contrary, where the Petitioner readily admits knowledge of supervisory status, such an admission must be given extraordinary weight since it is counter to the position being taken. Any meaningful or candid review of the cross-examination of Sanford and his multiple admissions of supervisory indicia reveals that there was no hostility, badgering, or confusion. Instead, simple yes and no questions were asked and Sanford conceded every point. Frankly, the admissions made by Sanford and other Union witnesses require dismissal of the Petition.

The Regional Director also completely discounts the documentary evidence presented by the Employer at the Hearing, consisting of four disciplinary notices issued by Console Supervisors dating back to 2013.[11] (DD&E 38; R-5). Apparently, under the Regional Director's heightened

[11] As made clear at Hearing, four (4) disciplinary notices are what the Employer was able to quickly locate during the compressed timeframe and rushed constraints of preparing for a Representation Hearing under the ambush rules. For 35-40 years, the Union never contested the issue of the status of the Console Supervisors. This changed for the first time when the Petition was filed on February 28, 2019 and thus began the Employer's search for the mountain of

standard of proof, it is of no significance that two (2) of the four (4) disciplinary notices were suspensions issued by two (2) Console Supervisors on the Voter List, Scott Lambert and Keith Pyne and that one of those involved discipline of Pajak. (R-5.) The Regional Director flippantly discounts these two suspensions (as well as the other two disciplines issued by Console Supervisors dating back to 2013) because the disciplinary notices allegedly "do not establish that the named console supervisors were involved in the investigation of the alleged misconduct, if they made the final decisions to discipline or if they had effectively recommended the discipline." (DD&E 38). The Regional Director misses a huge point - Pajak testified in this matter and never asserted that he was not disciplined by Lambert. Indeed, he stated that he was and falsely testified that Lambert was working in another job at the time. The Regional Director believes it is of no relevance that both disciplines were clearly issued by Console Supervisors, a point that was not disputed by the Petitioner. Even under the new burden of proof put forth by the Regional Director, it is evident that such disciplinary notices speak for themselves, once admitted into evidence. Instead, the Regional Director erroneously imposes on the Employer a burden that far exceeds the required preponderance of the evidence. In essence, the Regional Director is ruling that the disciplinary notices provided by the Employer with supporting testimony need documents to support the documents.

Further, the Regional Director inappropriately relies on the testimony from Manney to allow him to disregard one (1) of the four (4) disciplinary notices. Manney could not affirmatively provide whether he had knowledge that the Console Supervisor "consulted with management on the discipline." (Dec 11). Of course, whether the Console supervisor "consulted" with management

evidence it presented. Most certainly, this Region's rejection of strong, corroborated evidence in favor of a burden similar to that in a criminal trials urges the Board to reconsider the timing of the expedited election rules and the fixing of the burden on the Employer, particularly in matters such as this one.

as it pertained to a discipline is not dispositive on whether that Console Supervisor has the authority to issue discipline or effectively recommend discipline. Irrespective of this, Console Supervisors Costello and Cruz testified that Console Supervisors have the authority to issue discipline without having to seek approval from management. (Tr. 274, 286).

The Regional Director also made unwarranted credibility determinations against the Employer and in favor of the Petitioner. The Regional Director credited Pajak's testimony that "Lambert was acting as a Production supervisor," despite the fact that the Employer produced a document clearly showing that Lambert was a Console Supervisor at the time he issued the discipline to Pajak. (R-32). This point was also confirmed by Fraga on rebuttal. (Tr. 1045-1046). Both R-32 and Fraga's rebuttal were completely ignored by the Regional Director.

The Regional Director also erred in providing that even though "the Employer's witnesses asserted that console supervisors have the authority to discipline the operators, they did not provide the basis for this belief." (DD&E 38). In coming to this conclusion, the Regional Director rejects testimony from Cassano that BTL Jody Moffet told him he had the authority to discipline. (DD&E 10). This testimony was rejected because Cassano could not testify as to what Moffet specifically told him, even though it went unrebutted. The Regional Director also rejects Cassano's testimony that it is understood supervisors have the authority to discipline, even though, again this went unrebutted and unchallenged. Indeed, the Regional Director does not even provide a basis as to why Cassano's testimony should not be credited.

In addition, the Regional Director belabors the point that the Console Supervisor job description "does not reference the authority to discipline or effectively recommend discipline." (DD&E 39). In doing so, the Regional Director completely ignores other documentary evidence that establishes that Console Supervisors have the authority to discipline or effectively recommend

discipline. Indeed, at the Hearing, the Employer presented R-12, specifically documents marked P-66-000549 to P66-00633, which represent documents that overview the job responsibilities of a Console Supervisor. **As the relevant documents provide, specifically P66-000614 to P66-000617, Console Supervisors have the authority to discipline employees.** In addition, the Employer also presented R-11, specifically documents marked P66-000001 to P66-000189, which represent various performance agreements of Console Supervisors. Within each performance agreement, a yearly goal identified for each Console Supervisor includes ensuring "any subordinate infractions are thoroughly documented and appropriately followed up on." The Regional Director ignores all this evidence to support his flawed findings.

Furthermore, the Regional Director opines that (at least for the Employer) "conclusory statements regarding a purported supervisor's ultimate responsibility for all aspects of an area of work have no evidentiary value" and concludes that "[t]here is also no independent or reliable evidence, outside of the Employer's witnesses' conclusory statement, that console supervisors possess the authority to discipline or that they were specially told that they have this authority." (DD&E 38 - 39). The Regional Director's reliance on the claim that the Employer only provided "conclusory statements" is simply incorrect. First, there is documentary evidence (noted above) to support the testimony. Moreover, does the Regional Director's overarching "conclusory statement" rule apply to admissions against interest made by the Union's own witnesses who admitted that Console Supervisor possess the authority to discipline or effectively recommend discipline?

Indeed, how is a statement "conclusory" if Union witness Alexo admitted that Console Supervisors have the authority to discipline and that he is aware that some Console Supervisors

coach and provide verbal counseling to their direct report?[12] (Tr. 718). How is a statement "conclusory" if Union witness Sanford, without any hesitation, admitted that Console Supervisors have, from time to time, disciplined direct reports and that they have the authority to recommend discipline of direct reports? (Tr. 1035). How is a statement "conclusory" if Union witness Valentine testified that he possesses the "power to recommend discipline," but has not used it? (Tr. 799).

While the Employer acknowledges that discipline is rare (which is more a statement about the quality of the Employer than anything else), the irrefutable evidence indicates that Console Supervisors possess the authority to discipline or recommend discipline. It is well settled that individuals who possess the authority spelled out in the statutory definition contained in Section 2(11) are, of course, "supervisors" and can be held to be supervisors even if the authority has not yet been exercised. *See Fred Meyer Alaska, Inc*., 334 NLRB 646, 649 fn. 8 (2001); *see also U.S. Gypsum Co.*, 93 NLRB 91, 92 fn. 8 (1951); *see also Wasatch Oil Refining Co*., 76 NLRB 417, 423 fn. 17 (1948)**.** While the Regional Director contends that the "evidence in this case is distinguishable from that in the authority cited by the Employer in support" (DD&E 39), the Regional Director fails to explain how the authority cited above is distinguishable from the instant case. In reality, the Regional Director is again holding the Employer to a higher standard of proof than required by the Act and the Region is ignoring strong evidence to arrive at a manufactured finding of employee status.

[12] Indeed, Console Supervisors Costello and Cruz both testified that their preferred method of discipline includes informal coaching and other verbal discussions with their direct reports. (Tr. 274, 386). Somehow, the Region deems coaching and counselling as non-disciplinary actions.

3. Console Supervisors Adjust Grievances

The Regional Director erred in concluding that the record "fails to establish that console supervisors have the authority to adjust grievances." (DD&E 40). Yet again, the Regional Director holds the Employer to a standard of proof far higher than the preponderance of the evidence and also ignored clear testimony from Manney, Fraga, and Cruz that Console Supervisors have the authority to represent the Employer in grievance proceedings and adjust grievances on behalf of the Employer. (Tr. 51, 72, 381, 745).[13] Console Supervisor Costello also testified that although he has not adjusted a grievance on behalf of the Employer, he is aware that Console Supervisors have the authority to adjust grievances on behalf of the Employer and that he would not hesitate to do so. (Tr. 361 - 362).[14] More surprisingly, the Regional Director also ignores testimony from Petitioner's witnesses Sanford, Pajak[15], Pirrocco, and Console Supervisor Valentine, who all confirmed their awareness and/or personal involvement with Console Supervisors whose decisions

[13] Indeed, Article 19-3 of the CBA provides the following express requirement -

> First Step
>
> The employee and/or employee's steward or Union representative must present the grievance in writing and confer with **the appropriate supervisor and one other supervisor**. If an employee presents a grievance to the grieved supervisor, the steward or Union representative shall be given an opportunity to be present at the adjustment of such grievance.
>
> If the grieved supervisor does not hear the grievance within two days, or satisfy it within three days thereafter, the steward or representative may appeal the grievance to the second step.

(R-4). The Union and the Employer have operated under this provision for years. Tellingly, it requires the Union to bring the grievance to "supervisors" and it permits supervisors to answer or resolve grievances. As the Record unquestionably reflects, the Union itself has chosen time and again bring their grievances against Console Supervisors, to involve Console Supervisors at Step 1, and to accept resolutions made by Console Supervisors.

[14] To this end, and as was demonstrated at Hearing, Console Supervisors have received training from Manney to ensure their ability to hear and adjust grievances. (DD&E 12). The Regional Director argues that Console Supervisors are not allowed to resolve grievances, per Mr. Manney's training presentation. This is a false reading of the document since it uses the words "should not" instead of "may not." In any event, there is no rational argument to be made that the Console Supervisors have not heard and resolved grievances.

[15] Pajak admitted on cross-examination that if Console Supervisors were found to be employees under the Act and thus bargaining unit members, there would certainly be a conflict interest in having bargaining unit members hear and adjudicate grievances filed by other bargaining unit members. (Tr. 959).

were grieved or who had heard grievances at the first step. (Tr. 689-690, 800, 896-897, 942, 1032). It is apparent that the Region simply does not consider or value the evidence that it prefers not to have heard - no matter who provides such evidence.

The Regional Director also ignores the comprehensive documentary evidence introduced into evidence at the Hearing by the Employer. Employer's R-24 consisted of all two hundred-sixty-seven (267) grievances filed by the Union from January 2, 2018 to March 13, 2019, with a tabulated summary of the two-hundred-sixty-seven (267) grievances in R-23. In this instance, the material offered represents a sample of just over one year's worth of documentary evidence. Again, had there been weeks or months to prepare for a hearing that was designed to overturn decades of supervisory status, the Employer could have done more. But this flaw in the system again reveals that the ambush rules are not well suited for a case such as this.

These undisputed documents in R-23 and R-24 showed that at least seventy-six (76) of the grievances filed by the Union during this period, or approximately twenty-eight percent (28%) of all grievances filed, grieved the actions or orders of a Console Supervisor. How the Regional Director can seemingly ignore documentary evidence that provides that just under thirty-percent (30%) of all grievances filed by the Union within the past year grieved the order or actions of a Console supervisor is mind-boggling.

Instead, the Regional Director focuses on the twenty-two (22) grievances heard and/or resolved by Console Supervisors at the first step. (DD&E 14). In this regard, the Regional Director seemingly takes issue with the fact that the Employer did not call ***each*** Console Supervisor to testify about their role in ***each*** individual grievance. The Regional Director concludes that "the examples of grievances *allegedly* resolved solely by Console Supervisors at step one do not establish if they had performed investigations of the grievances involved, or if they acted merely

as a witness and processed the grievances based on management's decision." (DD&E 40 [emphasis added]). Manney testified about the role of Console Supervisors in grievances generally and this testimony went largely unrebutted by the Petitioner, but was still rejected by the Regional Director and condemned as "hearsay" even though it supported and provided context to documents admitted into evidence. Manney testified about the involvement of Console Supervisors Orlando Garcia Ramos, Mike Socha and Marine Preap in first-step grievances and his testimony went unrebutted by the Petitioner. Fraga, Costello and Cruz all testified that Console Supervisors have the authority to represent management in grievances, but this testimony was also summarily rejected by the Regional Director. In dismissing Costello's testimony, the Regional Director relies on that fact that he "was never involved in any grievance handling during the four years he was a console supervisor" (DD&E 13) as though that is dispositive to whether Console Supervisors have the authority to adjust grievances.

In rejecting the Employer's documentary evidence, the Regional Director holds the Employer to a standard that far exceeds that of the preponderance of the evidence. If this heightened standard of proof is accepted by the Board, Employers will have to call every single employee, supervisor and manager to satisfy the new burden of proof and the length of hearings will be measured in months or weeks, not days. In the end, the coupling of the Regional Director's wrongly imposed standard of proof with the realities of the time crunch in the ambush election rules creates a complete and total stacking of the deck against employers - an unfairness that must be addressed by the Board.

The Regional Director also dismisses the Employer's evidence using circular logic. On twenty-two (22) separate occasions a Console Supervisor adjusted a grievance at the first-step. Each one of these grievances is in evidence and "speaks for itself." While the Regional Director

reluctantly acknowledges, Console Supervisor Cruz's testimony, confirmed by Pirrocco, that he resolved a grievance at the step 1 stage "without consulting HR or operations," the Regional Director concludes that because Cruz allegedly refused to hear and adjudicate a second grievance with Pirrocco this somehow moots his *direct* testimony regarding the first grievance. (DD&E 13; Tr. 892-893). The Regional Director also credits Pirrocco's testimony that the reason Cruz did not hear and adjudicate another grievance with Pirrocco was "probably the result of being reprimanded by management for resolving an earlier grievance without the authorization to do so." (DD&E 13). This rubber stamping of Pirrocco's testimony by the Region demonstrates that the rules against hearsay and conjecture go out the window when a Union official testifies.

In short, the Regional Director's finding that "there is simply no direct evidence to clearly demonstrate that console supervisors had exercised independent judgement in hearing or resolving the grievances" (DD&E 41) is wholly unsupported and completely undercut by the record. However, in crediting Pirrocco's testimony that "console supervisors often ended up being at step one meetings when there was no production supervisor or day first line supervisor around (DD&E 15), the Regional Director then erred in failing to conclude that Consoles Supervisors, like productions supervisors and day first line supervisors, often do represent management during grievances and have the authority to adjust grievance on behalf of management.

4. Console Supervisors Reward Employees

The Regional Director erred in concluding that the record contains "insubstantial evidence that console supervisors exercise independent judgment in rewarding employees or effectively so recommend" and that the "evidence fails to establish that console supervisors exercise discretion in rewarding employees with meals within the meaning of the reward indicia of Section 2(11) of the Act." (DD&E 41, 42). In *Oakwood Healthcare,* Inc., 348 NLRB 686 (2006), the Board defined "independent judgment" to be "at a minimum" the authority to "act or effectively recommend

action, free of the control of others" and to "form an opinion or evaluation by discerning and comparing data." *Id*. at 693. Consistent with prior precedent, *Oakwood Healthcare* states that a judgment is not independent if it is dictated or controlled by detailed instructions, such as company policies or rules, verbal instructions of a higher authority, or provisions of a collective bargaining agreement. *Id*.; s*ee also Dynamic Science Inc*., 334 NLRB 391, 391 (2001).

For starters, the Regional Director seemingly ignored testimony from both the Employer and the Petitioner that Console Supervisors reward their direct reports in the form of LSR coins, lunch/dinner purchases, gift cards and recognition awards. Indeed, witnesses for both parties testified that supervisors, including Console Supervisors, have the authority to, and regularly exercise their authority to, reward their direct reports with LSR coins, lunch/dinner, gift cards and recognition awards. (Tr. 42, 43, 45, 200, 265, 266, 267, 383, 385, 386, 483, 665, 691, 887, 1036). Frankly, this point is so well documented and so universally admitted, it is shocking that the Regional Director finds to the contrary.

The Regional Director summarily dismissed the testimony of Costello and Cruz that they buy lunch for the operators they supervise as a form of recognition for their hard work without needing prior approval from management, because "the 2018 meal expenses report show that Costello purchased only on meal on May 27, 2018." (DD&E 18). Cruz's testimony that he bought meals about 6-12 times per year was disregarded because he did not buy any meals in 2018. *(Id.).* As highlighted at Hearing, Employer's R-20 purports to show only a sampling of expense reports submitted by Console Supervisors in 2018. (Tr. 566). Given the expedited timeframe in representation hearings, it was impossible to put together a complete list of all 2018 meal expense reports in time for Hearing. (Tr. 566). Importantly, no Union witnesses rebutted either Costello or Cruz's testimony that they buy lunch for operators they supervise as a form of recognition for their

hard work without the express permission of management and there is no basis to doubt their testimony. The Regional Director inappropriately relies on and affords undue significance to Costello's testimony that when "operations are smooth and nothing is really going on" (DD&E 18) he does not purchase a lot of lunches for the operators he supervises. The Regional Director erred in taking that to mean that he does not ever purchase lunches for the operators he supervises, an argument that is simply unsupported in the record.

It was also established at Hearing that the Employer maintains an LSR rewards program whereby supervisors reward employees with LSR coins for good or safe performance which can be used for a free meal in the cafeteria at the Refinery. (Tr. 199-200). An analysis of the LSR program revealed that over the course of a year, Console Supervisors awarded no less than twenty-eight (28) LSR coins to operators for good or safe performance. This was done by seven (7) different Console Supervisors. (DD&E 17). There is nothing in the record to suggest, and the Petitioner was unable to provide evidence to the contrary, that anyone other than a supervisor is permitted to distribute LSR coins if performance dictates. Yet, the Regional Director decides to completely disregard the LSR program, because Union official Pirrocco testified that she hands out LSR coins to co-workers. The Regional Director disregards the fact that Pirrocco hands out LSR coins to co-workers after they are given to her. (DD&E 17; Tr. 897). Indeed, Pirrocco admitted that she would give out the coins after receiving them from her supervisor, Hope Gray. She is not given the opportunity to decide what to do. Pirrocco simply performs the act of distributing some coins occasionally, but only as permitted by her supervisor. The Region should take notice that this would be evidence of a lack of independent judgment. Pajak's testimony on this topic was identical. Indeed, Pajak testified that he received coins from Tom Acea, a supervisor

in the Safety Department and was allowed to hand them out. (DD&E 18). The Regional Director erred in discounting this key distinction.

The Regional Director somehow finds the "console supervisor's purchase of meals for coworkers to be of a routine nature and [the actions] do not require or exhibit the kind of independent judgement contemplated by Section 2(11) of the Act" (DD&E 41). This is completely contrary to the evidence in the record. The Employer produced a report showing that nineteen (19) different Console Supervisors awarded a total of one-hundred-seventeen (117) meals to direct reports for a variety of reasons including turnarounds, safety recognition, refinery upsets, shutdowns and start-ups, for monthly safety meetings or other employee recognition purposes. (R-19; DD&E 18). There is no evidence they were told what to do and there is ample evidence that the Console Supervisors make the determination completely in their own discretion. As Employer's R-19 clearly demonstrates, some of these purchases were for more than four-hundred dollars ($400), while a great majority exceeded one-hundred dollars ($100). (R-19).

In addition, the record evidence is clear that Console Supervisors (or any supervisor for that matter) do not need management's approval to purchase meals for coworkers. (Tr. 47, 266-267, 385, 454, 483). Moreover, Petitioner witness Alexo admitted that there are no guidelines regarding when meals could be purchased, a fact that is initially credited by the Regional Director. (Tr. 691; DD&E 18). Indeed, a Console Supervisor's decision to recognize or reward an employee is not dictated or controlled by detailed instructions, such as company policies or rules, verbal instructions of a higher authority, or provisions of a collective bargaining agreement, a key factor in showing discretion, but completely lost on the Regional Director.

As the Regional Director notes, Manney testified that supervisors, including Console Supervisors, could, in addition to purchasing meals, also recognize and reward an employee by

recommending that employee receive certain awards, such as movie tickets and/or Visa/Amazon gift cards. (DD&E 16). This was confirmed by Console Supervisors Costello and Cruz and by Union witness Alexo. (Tr. 345-346, 386, 691). Costello also testified that on one occasion he asked Console Supervisor Batiato to recommended operator Brian Jordan to receive recognition for his performance during a trip condition and a $250 Amazon gift card was suggested. (DD&E 16). This transaction was also noted in the documents produced at Hearing. (R-5). In the face of all this evidence, the Regional Officer concludes, ratcheting up the burden of proof yet again: "Also insufficient are *conclusory* statements that console supervisors have regularly rewarded employees with gift cards or movie tickets, especially since there is no record evidence as to whether *all console supervisors* were told they have the authority to grant these rewards, *how often* console supervisors have granted these rewards, and the amount of the rewards." (DD&E 42 [emphasis added.). Regarding the $250 gift card, The Regional Director holds that "the evidence is *inconclusive* as to whether that recommendation was followed and whether Jordan actually received a reward in that amount." Meanwhile, Costello testified that "I believe [Jordan] received the gift card" and Manney testified that "if I recall correctly, [Jordan received a gift card] in the value of $250." (DD&E 16). Apparently, under the Regional Director's new heightened standard of proof, the Employer needed to submit even greater evidence of this uncontested fact that he was given a $250 amazon gift card.

Finally, the Regional Director inappropriately concludes that because not all Console Supervisors have an Employer provided credit card, and because some non-supervisors have an Employer provided credit card, this somehow diminishes the record evidence that Console Supervisors have the authority to reward or effectively recommend rewards for employees and consistently do so. As the Regional Director must be aware, whether an individual is given an

Employer provided credit card is not dispositive on whether that individual is a supervisor under the Act. *See TEC Elec., Inc*., Case Nos. 07-CA-37522, 07-CA-37980, 07-CA-38107, 2000 NLRB LEXIS 789, at *8 (November 7, 2000)(providing "the grant of a benefit such as a gasoline credit card does not, under the statute, make an individual a supervisor"); *see also Kanawha Stone Company, Inc.*, 334 NLRB 235, 241 (2001)(finding that the possession of a Company Credit card is not a type of prima indicia but to be considered when discussing secondary indicia). In the case of the Console Supervisors, what matters is how they are permitted to use the card. There is no dispute that they and other supervisors are permitted to make purchases to reward employees.

In the end, the Regional Director's analysis of the evidence regarding the rewards factor provides a classic example of how to make it virtually impossible for an employer to prove supervisory status, particularly in an expedited hearing. The Regional Director erred in refusing to credit the testimony of the Employer's witnesses, the admissions from the Petitioner's witnesses and the documentary evidence which all provide that Console Supervisors reward employees and effectively recommend rewarding employees.

5. Console Supervisors Schedule and Assign Work and Responsibly Direct Employees

The Regional Director's findings and conclusions regarding "scheduling, assignment of work & responsibly direct" completely discounts the overwhelming amount of testimony adduced at the Hearing and the abundance of documentary evidence in the record which unequivocally proves that Console Supervisors exercise discretion and independent judgment when it comes to scheduling, assigning work and responsibly directing work. Yet again, the Regional Director purports to hold the Employer to a standard far beyond the preponderance of evidence.

The Board has declined to find supervisory status based on scheduling of employees where there was no evidence that employees' work schedules or availability changed significantly from

week to week or the alleged supervisor did not have to resolve conflicts or problems concerning the availability of employees. *See Children's Farm Home*, 324 NLRB 61, 67 (1997); *see also Sears, Roebuck & Co*., 304 NLRB 193, 194 (1991). Here, both the testimony and documentary evidence clearly proves (at least under the Board's standard of proof) that Console Supervisors regularly resolve conflicts or problems concerning the availability of employees.

In finding that the evidence fails to establish that Console Supervisors possess supervisory authority with regard to scheduling and overtime, the Regional Director concludes that Console Supervisors lack "independent judgement" and/or "discretion." (Dec 43, 44). However, the significant role Console Supervisors play in scheduling is evident from Employer's R-2 and R-3, which show that in 2018 alone, forty (40) of the forty-six (46) Console Supervisors made over thirteen-thousand (13,000) changes to the set schedule.[16]

In response to this mountain of evidence and supporting testimony, the Regional Director tries to downplay and distinguish the significant role Console Supervisors play in scheduling. First, the Regional Director goes to great lengths to try to diminish the Console Supervisor's role by interpreting the scheduling data (R-3) to mean that "on a daily basis 35 console supervisory made 1 change and 5 made no change." (DD&E 22). However, even using the Regional Director's own calculation, nearly eighty-eight percent (88%) of Console Supervisors are making schedule changes on a *daily basis*. Certainly a key supervisory function being performed by almost ninety percent (90%) of the Console Supervisors on a daily basis cannot be construed as limited, occasional or sporadic. This is a gross error by the Regional Director and far exceeds his authority.

[16] Additionally, the fact that the Union grieves the actions of Console Supervisors as provided in R-23 and R-24 further supports the Employer's position that Console Supervisors effectively schedule and assign work (as well as administer the CBA).

Second, despite acknowledging that scheduling "may be time consuming and possibly complex" (DD&E 44), the Regional Director somehow concludes that all the Console Supervisors are doing is following established procedures or protocols. (DD&E 19, 44). In support of this erroneous conclusion, the Regional Director points to Side Letter H of the CBA, which provides scheduling guidelines. However, Side Letter H is a seventeen (17) page document that requires Console Supervisors to use discretion and independent judgement when filling a vacancy. Indeed, Console Supervisor Valentine's testimony clearly establishes that scheduling and assignment tasks are not merely administrative. (Tr. 794-795).[17]

Regarding Employer and Petitioner testimony adduced at the Hearing pertaining to scheduling, the Regional Director brazenly credits all Petitioner testimony over Employer testimony, without providing any rationale or basis. Console Supervisors Costello and Cruz both credibly testified that changes to the schedule by Console Supervisors are frequent and occur on a near daily basis. (Tr. 259, 374). Cruz outlined the types of scheduling issues he deals with in real-time, including adjusting the schedule to increase or decrease the workforce as needed and assigning and authorizing overtime. (Tr. 375). Costello and Cruz both testified that when other conflicts in the schedule arise, such as fatigue issues, overtime or absences, the Console Supervisor, in accordance with the CBA, must use discretion and independent judgement and modify the posted schedule as operations dictate, which often includes making snap judgments. (Tr. 260, 274).

Even the Regional Director acknowledges, that Console Supervisors, when faced with a scheduling issue, are "responsible to find a replacement" (DD&E 20), "review the shifts the

[17]Valentine's testimony that "the fatigue exception rules are not subject to much interpretation" is belied by his own inability to effectively explain the scheduling process which further demonstrates the complexity of the scheduling issues. It is also undermined by his later admission that the scheduling process is very complex. (Tr. 794-795).

employee is scheduled to work…to determine all potential fatigue issues" (DD&E 22) and "authorized to inform the current operator to remain until the relief operator shows up" (DD&E 20). However, when it comes time for a conclusion, the Regional Director holds that a "console supervisor has no discretion [other than to follow established protocol] in this regard." The Petitioner's witnesses claimed, in conclusory and unconvincing fashion, that nearly all schedule changes must be approved by an area supervisor or a business lead. This testimony has no support in the record and were merely self-serving statements. Nonetheless, the Regional Director swallowed them whole.

The Regional Director also erroneously concludes that there "was no reliable evidence that console supervisors can independently require off duty operators to come in or force an operator to stay for an additional shift." (DD&E 44). Misapplying the standard of proof again, the Regional Director holds that Costello's testimony to the contrary cannot be believed because it was uncorroborated. (DD&E 44). This is despite the fact that the Petitioner put forth zero witnesses to rebut Costello's testimony. The Regional Director also erroneously relies on the Employer's 2019 Reorganization Plan, which provides that a Console Supervisor must "notify his superiors when additional staffing is necessary to troubleshoot unit problems." (DD&E 44-45). Of course, the Regional Director misses the point that "notify" does not equate to "must receive permission." Moreover, the language the Regional Director relies on pertains solely to "troubleshooting unit problems." Employer R-3 shows that in 2018 alone, Console Supervisors granted overtime over two-thousand (2,000) different times. Therefore, the Regional Director's argument leads us to the absurd conclusion — that on two-thousand (2,000) separate occasions over the course of a year, Console Supervisors asked upper management to approve overtime.

The Regional Director errs in concluding that the "credible evidence also fails to establish that console supervisors exercise independent judgement in the assignment and direction of work, as defined by *Oakland Healthcare."* (DD&E 45). Regarding Console Supervisors assigning work, the Regional Director errs in concluding that "console supervisors' assignment decisions are based on their professional knowledge and training as well as the Employer's standard operating procedures and numerous established emergency procedures." (DD&E 46).

Cassano, Costello, and Cruz all testified that Console Supervisors routinely assign work to operators and assistant operators. (Tr. 201, 204, 260, 265, 309). Indeed, Costello testified that both scheduling and assigning functions are complex and occur on a daily basis. (Tr. 258, 260, 261, 262-265). Cruz testified that he also regularly assigns work. (Tr. 373 - 376). The record evidence clearly reflects that Console Supervisors are providing operators and assistant operators with significant overall duties and not merely ad hoc instruction that the operator or assistant operator perform a discrete task. *See WSI Savannah River Site,* 363 NLRB No. 113, slip op. at 3 (2016). In addition, the tasks that operators and assistant operators perform are not on a rotational basis or are otherwise controlled by detailed instructions, as argued by the Regional Director. *See Shaw, Inc.*, 350 NLRB 354, 355–356 (2007). In the Regional Director's world there must be specific instructions to cover every piece of equipment and every job task necessary in the 1,200 acre refinery. Instead, Console Supervisors are routinely tasked with designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.

The Regional Director erred in concluding that the "record also reflects that console supervisors do not responsibly direct employees." (DD&E 46). This unwarranted conclusion is based in large part on the Regional Director's finding that Console Supervisors lack the authority

to discipline or recommend discipline if an operator or assistant operator does not follow their direction. (DD&E 46, 47). Again, the Regional Director discounts or disregards both testimony and documentary evidenced adduced at the Hearing.

Cassano and Fraga testified that Console Supervisors routinely direct operators and assistant operators. (Tr. 204, 494-495). Fraga also testified that if Console Supervisors were not permitted to give direct orders (by being classified as employees) to operators and assistant operators, the Refinery would suffer operationally. (Tr. 473, 475). In addition, Console Supervisors Costello and Cruz testified that they routinely direct operators and assistant operators. Specifically, Console Supervisors Costello and Cruz provided that they instruct operators and assistant operators in the field regarding the work that needs to be completed based off of what the Console Supervisor is "seeing on the console." In emergency situations, Console Supervisor Costello testified that he directs operators and assistant operators in the field to perform the work that needs to be completed, when, and how. (Tr. 265). Console Supervisor Costello further testified that he directs work based on the skill set and operational proficiency of his direct reports. (*Id*.). Console Supervisor Cruz testified that he uses discretion and independent judgment when assigning a direct report to a specific task based on skill, operational proficiency and operational need. (Tr. 389-390). Console Supervisor Cruz further testified that despite their being a plethora of procedures in the Refinery that provide guidelines on how to complete certain tasks, there also exist a multitude of other tasks in which Console Supervisors must use their discretion and independent judgment when instructing direct reports how to prioritize and complete tasks. (Tr. 400).

Petitioner's witness Alexo intimated that Console Supervisors are mere robots. However, Alexo ultimately conceded that the Console Supervisors do have to direct employees, do have to

prioritize work, and their orders are expected to be followed. (Tr. 689). While all the Petitioner's witnesses attempted to minimize the roles of Console Supervisors, there were concessions by each that the work is complicated, it is important, it drives company economics, and it requires a level of discretion and independent judgment. (Tr. 815, 869, 1036).

Employer exhibits R-11, R-13 and R-14 further support the fact that Console Supervisors regularly direct employees. In an effort to downplay this, the Regional Director erroneously concludes that the documentary evidence "does not reflect the reality of the relationship they have with operators and AOs." (DD&E 47). This is again belied by a mountain of record evidence.

6. Console Supervisors Possess Numerous Secondary Indicia of Supervisory Status and When Combined With Primary Indicia Are Statutory Supervisors Under the Act

The Regional Director reluctantly seems to conclude that "console supervisors *may* have some secondary indicia of supervisory status [including] the occasional receipt of supervisor/confidential emails…and being salaried with benefits." (DD&E 50 [emphasis added]). However, the Regional Director erred in attributing absolutely no weight to the established secondary indicia. He also incorrectly concludes that additional supervisor indicia do not exist.

Regarding supervisor only meetings, the Regional Director erroneously concludes "there is no evidence in this case that the topics discussed at those meting relate to confidential or financial issues or personnel or work policies. Therefore, I cannot conclude that being included in supervisor-only meetings, without information regarding the nature of such meetings, confers supervisory status." (DD&E 48). There are several fundamental problems with taking this position. First, it is not dispositive that management meetings need to include confidential or financial issues or personnel or work policies. Second, the record evidence actually shows that supervisor-only meetings included discussion on "Labor Relations Overview" and teaching supervisors about "Weingarten Rights…fatigue guidelines...grievance handling…[and] direct dealings." (DD&E

29). Thus, the supervisor only meetings absolutely related to personnel or work policies, including the CBA. Third, Manney, Cassano Fraga and Console Supervisors Costello and Cruz testified that all supervisors, including Console Supervisors, attend these supervisory meetings. (Tr. 18, 74-77, 275, 376). Fourth, the Regional Director ignores the testimony of Console Supervisors Costello and Cruz that the supervisor meetings were intended to help all supervisors, including Console Supervisors, be more effective managers. (Tr. 256-257, 376-378). Finally, the Regional Director ignored the fact that no operator ever attended these supervisor meetings. (Tr. 377).

In addition, as it relates to Employer policies, the Regional Director acknowledges that "Fraga testified that only supervisors are allowed to initiate MOCs and have access to the MOC database, operators and assistant operators cannot initiate, accept or be responsible for MOCs." (DD&E 31). Despite this, the Regional Director concludes "that there is no legal support that console supervisors' responsibilities with MOCs would confer supervisor status." This is a pithy statement given his refusal to permit the parties to file post hearing briefs addressing the law.

Addressing the evidence that console supervisors interchange with production supervisors, the Regional Director concludes "the evidence does not demonstrate how many console supervisors are PS qualified, how frequently they were assigned PS duties, and if those PS duties confer supervisory status. (DD&E 49). Yet again, the Regional Director is trying to hold the Employer to a heightened standard of proof. The Regional Director also ignores Fraga's testimony on this subject, including Fraga's testimony providing every single Console Supervisor who interchanged with production supervisors out of the current listing of Console Supervisors. (*See* Tr. 622-628). This testimony was unrebutted and it is perfectly clear that Fraga is an authority on the subject given that he is the Production Superintendent at the Refinery. Additionally, the Union also made two arguments that Console Supervisors were working as Production Supervisors when

they disciplined Pajak and when they resolved a grievance for Pirrocco. This evidence (although having been trumped up by the Union to dodge other indicia of supervisory status) does reveal that the interchange of Console Supervisors to Production Supervisors is regular, not uncommon, and not at all unusual in the minds of the Union representatives.

The Regional Director also erred in disregarding the ratio of Console Supervisors to non-supervisory employees. The Regional Director relies on a 1989 case, *Phelps Community Medical Center*, 295 NLRB 486, fn. 15 (1986) for the proposition that "the Board has expressed a disinclination to consider ratio as a useful factor," but he has impermissibly turned this into a complete non-factor, contrary to Board law. *See Ken-Crest Services*, 335 NLRB 777, 779 (2001). The Regional Director also erred in completely disregarding the undisputed fact that the disputed individuals in this case are absolutely viewed as supervisors by employees. *Poly America* 328 NLRB 667, 670 (1999)(secondary indicia includes how fellow workers view employee and how individual views himself). Not only do the employees recognize this, but the Employer submitted proof that the Union recognized this in prior arbitrations and grievance documents.

The Regional Director is correct that secondary indicia of supervisory status are not dispositive without evidence of at least one statutory indicator of such status. *See Station Casinos Inc.,* 358 NLRB 637, 644 (2012). Here however, the overwhelming amount of documentary and testimonial evidence presented by the Employer establishes that the Console Supervisors have authority, in the interest of the employer, to hire, discharge, assign, reward, discipline, responsibly direct and adjust grievances, or pick any of these. As such, the secondary indicia when combined with the multitude of primary indicia, establishes and fully corroborates that Console Supervisors are statutorily supervisors under the Act.

D. The Board's Expedited Rules For The Handling Of Representation Petitions, The Conduct Of The Hearing and The Rejection of the Employer's Forty Year Exclusion Of Console Supervisors From The Bargaining Unit Has Resulted in Prejudicial Error Against The Employer and A Complete Lack of Due Process

As stated during the Employer's opening at Hearing, the Union's conduct during this proceeding, and in filing the Petition, represents extraordinary bad faith. The Employer (and its predecessors) and Union have been parties to a series of collective bargaining agreements since 1945 at the Bayway Refinery, which opened in the early 1900s. At all times that Console Supervisors have existed at the Bayway Refinery, they have been excluded from the collective bargaining agreements covering operators and assistant operators, have held the title Console Supervisors, and have been statutory supervisors under the Act.

Despite this historic exclusion, on February 28, 2019, Pajak, an employee at the Bayway Refinery for over twenty-five (25) years and the Union's President, filed the Petition on behalf of the Union. Irrespective of the forty (40) year, universally-accepted, supervisory status of Console Supervisors at the Refinery, the Employer was nonetheless required to prove supervisory status under a shortened time-frame that prejudiced the Employer and severely restricted its due process. Thus, after forty (40) years, the Employer under two (2) weeks to put together all its evidence and the Union was required to do nothing, other than roll out witnesses willing to make generalized statements about employee status or witnesses (like Pajak) simply willing to make up information on demand. Respectfully, the Union should have some burden in this process to undue universally accepted supervisory status of an entire unit. Given the Region's effective re-writing of how an Employer can prove its case, the task was made all the more difficult.

The Employer implores the Board, under this specific factual scenario, to reconsider the Board's expedited election rules. Prior to 2015, for decades, the Board adhered to a more balanced set of pre-election procedures that have allowed employers sufficient time and opportunity to raise

issues affecting the conduct of elections in appropriate pre-election hearings. Such issues have included questions regarding the appropriateness of the petitioned-for bargaining unit as well as the eligibility of certain categories of employees to vote in the election. Following such hearings, employers have generally been allowed twenty-five (25) days to request review of Regional Director decisions by the Board prior to any tally of ballots in an election. The expedited election Rules implemented in 2015 made sweeping procedural changes that depart from the plain language and legislative history of the Act and exceed the Board's statutory authority. Those sweeping changes have significantly prejudiced the Employer here and the lack of due process is readily apparent. The result is that faulty election rules provided this Region with a path to trample on the Employer's rights and due process, in issuing a shoddy, defective DD&E.

Having less than two (2) weeks to prepare for the Hearing, the Employer did everything it could given the shortened time frame to gather witnesses and prepare documentary evidence. However, not only did the expedited election rules prejudice the Employer and result in a lack of due process, but so did the conduct of the Hearing. At Hearing, the Hearing Officer, on no less than ten (10) separate occasions (both on and off the record), attempted to rush the Employer through the Hearing. Indeed, the record is replete with comments from the Hearing Officer that include - how much longer the Employer has with a particular witness, belaboring how long the Hearing is taking, imploring the parties to move the Hearing along, questioning whether the next witness will be quick or long, urging the parties to get through whatever issues they were faced with, and/or summarily requesting to move on. (Tr. 90-91, 297, 369-370, 429-430, 445-445, 446, 701-702, 731-732, 733, 781, 804, 866-867, 911, 941-942, 953, 1031).

Irrespective of these apparent attempts to rush the Employer through the Hearing, the Employer nonetheless compiled and presented an impressive record. The Employer had six (6)

different witnesses testify, which resulted in a transcript that was over twelve-hundred (1,200) pages. In addition, the Employer authenticated and placed into evidence over three-thousand (3,000) pages of evidence supporting the testimony. Moreover, the Employer was prevented from filing a post-hearing brief. Instead, the Regional Director permitted the parties to submit a factual highlight document that was not permitted to contain any case law and which was due on the third (3rd) business day following the close of the Hearing. After having to wait for an expedited transcript that cost over twelve-thousand dollars ($12,000) to obtain, the Employer, in essence, had one (1) business day to submit its post-hearing factual highlights.

The importance of the Hearing Officer's conduct, the robust record, and the limited time-frame to file post-hearing factual highlights must not be understated. This is because the essence of the Regional Director's findings and conclusions were that the Employer did not provide enough evidence to substantiate its position that Console Supervisor were statutory supervisors under the Act. The Regional Director's findings and conclusions beg the following question - if six (6) credible witnesses and over three-thousand (3,000) pages of documentary evidence is not enough to carry its burden of proof, what is enough?

To further emphasize the prejudicial error and lack of due process the Employer has been faced with in this case, and to further highlight how the Board's expedited election rules focus on speed over accuracy, the Region decided to, after taking eighty-nine (89) days from the close of Hearing to reach a DD&E, schedule an election on July 1, 2019. After taking nearly three (3) months to draft the DD&E that can best be described as the Union's reply brief (the Union's post-hearing factual highlights were stricken from the record for being improperly filed and not served on the Employer), the Region gave the Employer two (2) weeks to prepare for an election, during one of the most heavy vacation and holiday weeks of the year (4th of July). In its hastiness to

schedule an election, the Regional Director set a date for the election that, given the Employer's operation, would disenfranchise nearly half the proposed unit from voting. Following multiple communications from the Employer, the Region has now changed the Election to July 2 and 3. It is inexplicable that the Regional Director and multiple others that worked on the DD&E do not have even the slightest grasp on the Employer's operation after all this time.

In the end, the history at Refinery, specifically the organizational hierarchy, in tandem with the expedited election rules, conduct of the Hearing Officer, and delayed and inequitable actions of the Regional Director have resulted in prejudicial error and a lack of due process on the Employer. As such, the Employer implores the Board, under this specific factual scenario, to reconsider and re-write the Board's expedited election rules.

E. The Board Should Stay Further Processing Of The Petition And Holding The Election Until It Grants The Employer's Request For Review And Determines That The Decision and Direction of Election Was Erroneous

An analysis of the record evidence compels the conclusion that the Regional Director wrongfully determined that the Console Supervisors are statutory employees under the Act. It is thus imperative that the Board stay the further processing of the Petition and the holding of the election until the Board grants the Employer's Request for Review and determines that the Regional Director's DD&E was inaccurately decided.

In particular, the Regional Director's decision to allow supervisors to vote significantly changes the character of the voting unit. A group with little or no community of interests with the bargaining unit could have a profound impact on the issues discussed during the campaign and the election itself. In addition, it should be remembered that the DD&E asserts that the Employer only demonstrated evidence that some, but not all, of the Console Supervisors are supervisors under the Act. If this is the case, and if an election proceeds, there will be multiple issues to determine relating to individual supervisory status and potential taint.

As a result, the election should be stayed pending resolution of this issue. A stay would prevent the waste of time and money of both the Petitioner and the Employer until this issue is resolved. In addition, a stay will prevent section 2(11) supervisors from acting as if they have Section 7 rights to organize and join a union. If voting occurs, there is really no way to undo this. Therefore, for all the foregoing reasons, the election should be stayed. *See Piscataway Assocs.*, 220 NLRB 730 (1975) (Board granted Employer's request for review and stayed the election pending decision on review after Regional Director issued DD&E finding that six building superintendents were not supervisors within the meaning of the Act); *see also Angelica Healthcare Servs. Group*, 315 NLRB 1320 (1995) (Board granted Union's request for review and stayed the election).

V. CONCLUSION

The Regional Director erred in finding that the Console Supervisors were not supervisors under the Act and in ordering an election. Accordingly, the Employer respectfully requests that the Board grant its Request for Review and its Request to Stay the Election.

Dated: June 26, 2019

Respectfully submitted,

/s/ *Glenn J. Smith*

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CERTIFICATE OF SERVICE

I, Glenn J. Smith, Esq., certify that on this date I caused a copy of the foregoing Employer's Request For Review Of Decision And Direction Of Election And Request To Stay Election to be served via Electronic Filing through the Board's website on the Board and via E-mail and Federal Express Overnight Mail upon:

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Date: June 26, 2019